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The Honorable John C. Coughenour  
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**UNITED STATES DISTRICT COURT**  
**WESTERN DISTRICT OF WASHINGTON**  
**AT SEATTLE**  
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17 OMNI INNOVATIONS, LLC, a Washington  
18 limited liability company; JAMES S.  
19 GORDON, JR., a married individual,  
20

21 Plaintiffs,

22 v.

23 SMARTBARGAINS.COM, LP, a Delaware  
24 Limited Partnership,

25 Defendant.  
26  
27  
28

1 NO. 06-cv-01129-JCC

2 **DEFENDANT'S MOTION FOR**  
3 **JUDGMENT ON THE**  
4 **PLEADINGS PURSUANT TO**  
5 **FED.R.CIV.P. 12(c)**

6 NOTE ON MOTION CALENDAR:  
7 February 12, 2010  
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## I. INTRODUCTION

Defendant SmartBargains.com, LP requests judgment on the pleadings, pursuant to Federal Rule of Civil Procedure 12(c), dismissing all of Plaintiff James S. Gordon, Jr.’s claims with prejudice. Gordon previously filed another lawsuit which alleged precisely the same claims as this one—Gordon et al. v. Virtumundo et al., U.S.D.C. W.D.Wash. Case No. 06-cv-00204-JCC. This case also involves claims under CAN-SPAM (15 U.S.C. § 7701, *et seq.*), the Washington Commercial Electronic Mail Act (“CEMA”, RCW Ch. 19.190), and the Washington Consumer Protection Act (“CPA”, RCW § 19.86.020). In Virtumundo, this Court granted summary judgment against Gordon. 2007 U.S. Dist. LEXIS 35544 (W.D.Wash. May 15, 2007) (Coughenour, J.) (“Virtumundo I”). The Ninth Circuit affirmed this Court’s decision, “commend[ing] the district court’s pioneering analysis in this uncharted territory”. Gordon v. Virtumundo, Inc., 575 F.3d 1040, 1048 (9th Cir. 2009) (“Virtumundo II”). The deadline for requesting certiorari from the United States Supreme Court has passed. Consequently, Virtumundo has been fully and finally resolved.

In Virtumundo, the parties engaged in extensive discovery, including a lengthy deposition which provided Gordon with abundant opportunities to provide any evidence proving he was an Internet access service or that his other claims had a legitimate basis. Now that Virtumundo has been resolved, SmartBargains requests this Court grant judgment on the pleadings pursuant to Rule 12(c).

## II. FACTS

**A. Gordon's Claims in Virtumundo Were Identical to His Claims in This Case.**

The First Amended Complaint in this case (“FAC”, Dkt. No. 4) alleges SmartBargains “initiated the transmission” of emails to Gordon’s computer, causing Gordon damage “as the provider[] of [an] Internet access service.” (*Id.* at ¶ 18.) Similarly, the First Amended Complaint in Virtumundo (“Virtumundo FAC”) alleged CAN-SPAM violations based on Gordon’s claimed status as an Internet access service harmed by the receipt of emails the defendants had purportedly sent. (Virtumundo FAC at ¶¶ 3.4, 4.1.1-

1 4.1.10.<sup>1</sup>)

2 In this case, the FAC claims SmartBargains “initiated, conspired . . . to initiate, or  
3 assisted the transmission of [emails]” which contained false or misleading header  
4 information and “misrepresent[ed] or obscure[d] information in identifying the point of  
5 origin or the transmission path thereof.” (FAC at ¶¶ 13-16.) Gordon’s CEMA claim in  
6 Virtumundo pleaded similar deficiencies. (Virtumundo FAC at ¶¶4.2.1-4.2.2.)

7 Gordon’s CPA claim in this case is based on SmartBargains’s alleged CAN-  
8 SPAM and CEMA violations (FAC at ¶ 20), as was his CPA claim in Virtumundo.  
9 (Virtumundo FAC at ¶¶ 4.2.4.-4.2.5.)

10 **B. Gordon Had a Fair Opportunity to Litigate the Identical Issues in**  
11 **Virtumundo.**

12 When affirming this Court’s summary judgment in its entirety, the Ninth Circuit  
13 determined there had been ample opportunity for Gordon to conduct discovery and to  
14 litigate the relevant issues:

15 Based on a dense record developed through substantial discovery, the  
16 district court granted summary judgment in favor of Virtumundo,  
Adknowledge, and Lynn (collectively, “Virtumundo”) on all of Gordon’s  
17 claims.

18 Virtumundo II, 575 F.3d at 1045. Gordon’s evidence included a 489-page deposition  
19 transcript. Virtumundo I, 2007 U.S. Dist. LEXIS 35544 at \*42.

20 **C. This Court Decided All Issues Against Gordon in Virtumundo, and the Ninth**  
21 **Circuit Affirmed This Court’s Final Judgment.**

22 In Virtumundo, when analyzing Gordon’s virtually identical claims, this Court  
23 held as follows:

24 **1. Gordon Has No Standing to Allege CAN-SPAM Violations.**

25 In Virtumundo I, this Court held that Gordon is not an “Internet access service”  
26 that was “adversely affected” by alleged CAN-SPAM violations. Virtumundo I, 2007

28 <sup>1</sup> SmartBargains requests that the Court take judicial notice of the Virtumundo FAC. A copy of  
that complaint is attached as Exhibit A.

1 U.S. Dist. LEXIS 35544 at \*29. The Ninth Circuit affirmed and further held that Gordon  
2 lacks standing under CAN-SPAM because he is not a *bona fide* Internet access service  
3 adversely affected by violations of the CAN-SPAM Act. Virtumundo II, 575 F.3d at  
4 1057. (“[W]e conclude that Gordon does not fit any reasonable definition of ‘Internet  
5 access service’ provider.”) The Ninth Circuit further determined that Gordon sought to  
6 receive commercial email for financial benefit and could not be said to be “adversely  
7 affected” by its receipt:

8 [t]he burdens Gordon complains of are almost exclusively self-imposed and  
9 purposefully undertaken. Here, Gordon acknowledges that he benefits from  
10 the receipt of spam through his research and monetary settlements. The fact  
11 that Gordon derives substantial financial benefit but endures no real ISP-  
12 type harm from commercial e-mail, coupled with his unusual efforts to seek  
13 out and accumulate-- rather than avoid or block--spam, demonstrates that  
14 he has not been adversely affected by alleged violations of the federal act in  
15 any cognizable way.

15 575 3d at 1057.

16 2. **Gordon’s CEMA Claims Are Preempted Because They Are Based on  
17 Immaterial Errors; Further, He Is a Professional Plaintiff Who Is Not  
18 Deceived by Email Headers.**

19 In Virtumundo I, this Court held that Gordon’s alleged CEMA violations “are for  
20 immaterial errors that may not be litigated under state law” (Id. at \*39). The Ninth Circuit  
affirmed, ruling as follows:

21 The CAN-SPAM Act established a national standard, but left the individual  
22 states free to extend **traditional tort theories such as claims arising from  
23 fraud or deception** to commercial e-mail communication.

24 575 F.3d at 1063 (emphasis added). The Ninth Circuit held that Gordon’s CEMA claims  
25 were preempted because they had “no basis in traditional tort theories”. Id. at 1064. The  
26 Ninth Circuit also held Gordon “was not in any way misled or deceived” by the emails he  
claimed to have received. Id. at 1063. It emphasized Gordon is a professional plaintiff  
who “[s]ince at least 2004, has held no employment [and] his only income source has  
come from monetary settlements from his anti-spam litigation campaign.” Id. at 1056.

### **3. Gordon's CPA Claims Fail Because They Are Based on His Preempted CEMA Claims.**

In Virtumundo I, this Court held that “[b]ecause Plaintiffs’ preempted CEMA claims are the basis for their CPA claims, the CPA claims too must fail” (Id. at \*41). The Ninth Circuit affirmed. 575 F.3d at 1065.

**D. Gordon Admits to Being a Professional Plaintiff and Therefore Cannot be Misled by Email Headers.**

In one of the myriad commercial email cases which have been Gordon's sole source of income for half a decade, Gordon v. SubscriberBASE, Inc., ("SubscriberBASE"), Gordon took pride in his aggressive litigiousness, displaying the title "professional plaintiff" like a prized achievement:

## PROFESSIONAL PLAINTIFF

Gordon has filed lawsuits against illegal spammers since December 2003. He has been instrumental in networking with dozens of private anti-spam litigants throughout America. "Professional Plaintiff" should not be a pejorative term. The fact that a person is good at marshalling facts for use in litigation should not be held against that person.

SubscriberBASE, U.S.D.C. E.D.Wash, Case No. 08-cv-05037-RHW, Complaint (Dkt. No. 1-1).<sup>2</sup>

### III. ARGUMENT

#### **A. Standard for Granting Judgment on the Pleadings.**

In FMC Techs., Inc. v. Edwards, 464 F. Supp. 2d 1063, 1066 (W.D.Wash. 2006) (Coughenour, J.) this Court set forth the standard for granting a Fed.R.Civ.P. 12(c) motion:

A Federal Rule of Civil Procedure 12(c) “[j]udgment on the pleadings is proper when, taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law.” Honey v. Distelrath, 195 F.3d 531, 532-33 (9th Cir. 1999)...

<sup>2</sup> SmartBargains requests that the Court take judicial notice of the complaint Gordon filed against SubscriberBASE. A copy of that complaint is attached as Exhibit B.

1           The Court's focus is not on which issues of fact remain for trial. Instead, its  
2           focus is on which legal theories may survive given the facts alleged.  
3           Accordingly, for the purposes of determining the instant motions, the  
4           evidentiary distinctions between Rule 56, Rule 12(b)(6), and Rule 12(c) are  
5           not as important as their common goal of determining whether one party  
6           must prevail as a matter of law. The Court now turns to that question.

7           FMC Techs., 464 F.Supp. at 1066. In this case, Gordon's FAC makes essentially the  
8           same claims he made in Virtumundo, which this Court summarily dismissed and the  
9           Ninth Circuit agreed had no legal support.

10          Because Gordon has litigated the same issues in Virtumundo and lost, he is  
11          precluded from re-arguing those issues in this case. Even assuming *arguendo* that all the  
12          allegations in the FAC are true, SmartBargains is entitled to judgment as a matter of law.  
13          “Collateral estoppel” or “offensive nonmutual issue preclusion” generally prevents a  
14          party from relitigating an issue that the party has litigated and lost. *See Catholic Social  
15          Servs., Inc. v. I.N.S.*, 232 F.3d 1139, 1152 (9th Cir. 2000). The application of “offensive  
16          nonmutual issue preclusion” is appropriate if:

- 17           1. there was a full and fair opportunity to litigate the identical issue in the  
18           prior action, *see Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1399 (9th  
19           Cir. 1992); Resolution Trust Corp. v. Keating, 186 F.3d 1110, 1114 (9th  
20           Cir. 1999); Appling v. State Farm Mut. Auto Ins. Co., 340 F.3d 769, 775  
21           (9th Cir. 2003);
- 22           2. the issue was actually litigated in the prior action, *see Appling*, 340 F.3d at  
23           775;
- 24           3. the issue was decided in a final judgment, *see Resolution Trust Corp.*, 186  
25           F.3d at 1114; and
- 26           4. the party against whom issue preclusion is asserted was a party or in privity  
27           with a party to the prior action, *see id.*

28          *See also Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006);  
29          Robi v. Five Platters, Inc., 838 F.2d 318, 322 (9th Cir. 1988). Virtumundo has a  
30          dispositive effect on this lawsuit, and all four factors weigh heavily in favor of dismissing  
31          Gordon's claims in this case.

1           **B. As a Matter of Law, Gordon's Claims Fail Because They Present the Same  
2           Issues He Lost in Virtumundo.**

3           Application of the four prongs of the collateral estoppel test indicates Gordon is  
4           precluded from litigating his identical issues in this case:

5           **1. Gordon Had a Full and Fair Opportunity to Litigate the Identical  
6           Issues.**

7           This Court has determined that the litigation in a prior lawsuit of an issue critical  
8           to the current lawsuit indicates the first prong of the collateral estoppel test has been met:

9           While the two *cases* are surely different, the question of whether Defendant  
10          was legally married to Ms. Devereaux under Washington law was a crucial  
11          issue for his estate claim, and it is a critical issue as to the viability of  
12          Plaintiff's claims in this forum . . . . Because Defendant's marital status was  
13          crucial to his claim on Ms. Devereaux's estate, he cannot argue that [he] did  
14          not have a "full and fair opportunity to litigate" the question. Every  
15          incentive and opportunity to persuade the state court was present at that  
16          time, and therefore Defendant is collaterally stopped from challenging  
17          whether he and Ms. Devereaux were married as that term is defined under  
18          Washington law.

19           Northwest Adm'rs, Inc. v. Cutter, 2008 U.S.Dist. LEXIS 512, \*8-9 (W.D.Wash. Jan. 24,  
20           2008) (Coughenour, J.).

21           Similarly, Gordon had a full and fair opportunity to litigate issues in Virtumundo  
22          which are identical to those presented in this lawsuit. Gordon had an opportunity to make  
23          a record in Virtumundo and to advance any facts or testimony that supported his claim to  
24          be an Internet access service. He took full advantage of that opportunity. *See Virtumundo*  
25          II, 575 F.3d at 1045 ("Based on a dense record developed through substantial discovery,  
26          the district court granted summary judgment in favor of [Virtumundo] on all of Gordon's  
claims"). However, despite the extensive record and a fair opportunity to make his  
arguments, Gordon failed to convince either this Court or the Ninth Circuit that he is an  
Internet access service with standing to bring a private action under CAN-SPAM. Gordon  
also had an opportunity to convince this Court and the Ninth Circuit that his virtually  
identical CEMA and CPA claims were not preempted, but both courts ruled against him.

1           **2. The Issues In This Case Were Litigated in Virtumundo.**

2           The issues of (i) whether Gordon lacks standing as an Internet access service that  
3           is adversely affected; and (ii) whether Gordon's state law theories were preempted by  
4           CAN-SPAM, were actually litigated in the Virtumundo case, as discussed in section  
5           III.B.3 below. Therefore, the second prong of the collateral estoppel test is met.

6           **3. All Issues Were Decided Against Gordon in a Final Judgment.**

7           In Virtumundo I, this Court decided the issues in a final judgment which the Ninth  
8           Circuit affirmed in Virtumundo II. For a ruling to be final, it must "end the litigation on  
9           the merits," Catlin v. United States, 324 U.S. 229, 233, 89 L.Ed.2d 911, 65 S.Ct. 631  
10          (1945) (citation omitted), and the judge must "clearly declare his intention in this  
11          respect," United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 232, 2 L.Ed. 721,  
12          78 S.Ct. 674 (1958).

13          There can be no question about the finality of the ruling in Virtumundo. This  
14          Court granted the defendants' motion for summary judgment, dismissing all of Gordon's  
15          causes of action. Virtumundo I, 2007 U.S. Dist. LEXIS 35544 at \*47. This Court also  
16          struck the trial date and named the defendants as the prevailing parties. Id. at \*48. The  
17          Ninth Circuit affirmed this Court's judgment, and the deadline for petitioning for  
18          certiorari to the U.S. Supreme Court has passed. Supreme Court Rule 13(1) provides that  
19          such a petition is timely when it is filed "within 90 days after entry of the judgment". The  
20          Ninth Circuit's opinion in Virtumundo II was issued on August 6, 2009; accordingly, the  
21          deadline for a certiorari petition was November 4, 2009.

22          Both this Court in Virtumundo I and the Ninth Circuit in Virtumundo II decided  
23          all issues against Gordon, as follows:

24           **a. This Court Held, and the Ninth Circuit Affirmed, That Gordon  
25           Does Not Have Standing as an Internet Access Service.**

26          On May 15, 2007, this Court granted the Virtumundo defendants' motion for  
27          summary judgment. The Court determined Gordon had no standing to sue under CAN-  
28          SPAM because he was not an "Internet access service" that was "adversely affected" by

1 Gordon's alleged CAN-SPAM violations. (*Virtumundo I*, 2007 U.S. Dist. LEXIS 35544  
2 at \*16, \*25.) The Court explained its holding as follows:

3 Plaintiffs . . . admit to *benefitting* from spam by way of their research  
4 endeavors and prolific litigation and settlements. This belies any suggestion  
5 that Plaintiffs are "bona fide Internet service providers" that have been  
6 "adversely affected" by spam. Instead, Plaintiffs' continued use of other  
7 people's e-mail addresses to collect spam and their undisputed ability to  
8 separate spam from other e-mails for generating lawsuit-fueled revenue  
9 directly contradicts any hint of adverse effect that otherwise might exist.  
Plaintiffs are not the type of entity that Congress intended to possess the  
limited private right of action it conferred on adversely affected bona fide  
Internet access service providers.

9 Id. at \*29 (emphasis original).

10 The Ninth Circuit affirmed this Court's summary judgment in *Virtumundo II*:

11 [A] threshold issue is whether the plaintiff satisfies the statutory standing  
12 requirements . . . the district court concluded that Plaintiffs had not  
13 demonstrated adequate harm . . . and therefore lacked standing with respect  
to these federal claims . . . We agree that Gordon lacks standing to bring a  
private action under the CAN-SPAM Act.

14 *Virtumundo II*, 575 F.3d at 1048. The Ninth Circuit further provided: "[W]e conclude  
15 that Gordon does not fit any reasonable definition of 'Internet access service' provider"  
16 and "We hold that Gordon is not an 'Internet access service' provider within the meaning  
17 of the CAN-SPAM Act." (*Id.* at 1052.) Since Gordon has no standing to bring a CAN-  
18 SPAM claim in any lawsuit, this Court should dismiss his CAN-SPAM claim.

19

20       **b. This Court Held, and the Ninth Circuit Affirmed, That  
21           Gordon's CEMA Claim Involves "Immaterial Errors" and Is  
22           Therefore Preempted.**

23       In *Virtumundo I*, this Court also dismissed Gordon's CEMA claims. These claims  
24 related to "from lines" in the "headers" of emails, which Gordon claimed were  
misleading "because the 'from name' alone does not identify [the Gordon defendants]."  
25 2007 U.S. Dist. LEXIS 35544 at \*35. They also concerned "subject lines" which were  
26 allegedly false and misleading. *Id.* at \*34.

27       Gordon's CEMA claims in *Virtumundo* were based on allegations nearly identical  
28 to the ones he makes in this case. The FAC claims SmartBargains "initiated, conspired...

1 to initiate, or assisted the transmission of [emails]" which contained false or misleading  
2 header information and "misrepresent[ed] or obscure[d] information in identifying the  
3 point of origin or the transmission path thereof." (FAC at ¶¶ 13-16.) Gordon's CEMA  
4 claim in Virtumundo pleaded similar deficiencies. Virtumundo FAC at ¶¶4.2.1-4.2.2.

5 This Court determined in Virtumundo I that CAN-SPAM pre-empted CEMA  
6 claims which did not specifically address "falsity or deception" in emails. Id. at \*31, \*37.  
7 The Court further concluded as follows:

8 [T]he Court cannot find that "from addresses" ending with a domain that  
9 facilitates an accurate identification of Defendants could in any sense be  
10 found "false" or "deceptive." Accordingly, while claims actually alleging  
11 falsity or deception under CEMA would not be preempted, **Plaintiffs' claims here – for, at best, "incomplete" or less than comprehensive information – are for immaterial errors that may not be litigated under state law.** Plaintiffs have not raised any issues of material fact that could  
12 prove Defendants' e-mails materially "false or deceptive" as those terms  
13 are used in the CAN-SPAM Act. Accordingly, Plaintiffs' CEMA claims are  
preempted by CAN-SPAM.

14 Id. at \*39 (emphasis added).

15 The Ninth Circuit affirmed this Court's dismissal of Gordon's CEMA and CPA  
16 claims:

17 The CAN-SPAM Act established a national standard, but left the individual  
18 states free to extend traditional tort theories such as claims arising from  
19 fraud or deception to commercial e-mail communication. Virtumundo II,  
575 F.3d at 1063.

20 As stated by our district court, Gordon's claim is "for, at best, 'incomplete'  
21 or less than comprehensive information" regarding the sender. Such  
22 technical allegations regarding the header information find no basis in  
traditional tort theories and therefore fall beyond the ambit of the exception  
languages in the CAN-SPAM Act's express preemption clause. Id. at 1064  
(citations omitted).

23 In sum, Gordon's alleged header deficiencies relate to, at most, non-  
24 deceptive statements or omissions and a heightened content or labeling  
requirement. Regardless of the merits of his arguments, assuming they are  
25 actionable under CEMA, **such state law claims falter under the weight of federal preemption. Summary judgment was properly entered on Gordon's CEMA claims.** Id.; emphasis added.

26  
27 In light of the Virtumundo decisions, alleged email header deficiencies must be  
28 material. But Gordon's FAC in this case bases his CEMA claim on the same kinds of

1 immaterial deficiencies the Virtumundo courts held inadequate to survive preemption.  
2 Further, a self-identified “professional plaintiff” like Gordon must base his CEMA claim  
3 on the premise that he is misled by header information in the commercial emails he  
4 deliberately harvests. This is a tall order, and Gordon’s FAC in this case does not even  
5 attempt to fill it.

6 The FAC does not allege that Gordon was ever misled by any emails he allegedly  
7 received from SmartBargains. Gordon does not allege that he read, opened, was misled  
8 by any subject line or header information in, or was in any way affected by any email  
9 sent by SmartBargains. He only claims that he was damaged by the receipt of commercial  
10 email in general (FAC at ¶ 20), which under the Virtumundo decisions is plainly  
11 insufficient.

12 In Virtumundo II, the Ninth Circuit held Gordon “was not in any way misled or  
13 deceived.” 575 F.3d at 1063. It noted that Gordon makes his living from hunting for  
14 commercial email violations. Id. at 1056. However, the Virtumundo decisions require  
15 Gordon to base his CEMA claim on common law tort theories arising from fraud or  
16 deception. Gordon’s FAC fails to allege most of the nine elements required to  
17 demonstrate common law fraud<sup>3</sup> in Washington:

- 18 (1) representation of an existing fact;
- 19 (2) materiality;
- 20 (3) falsity;
- 21 (4) the speaker’s knowledge of its falsity;
- 22 (5) intent of the speaker that it should be acted upon by the plaintiff;
- 23 (6) plaintiff’s ignorance of its falsity;
- 24 (7) plaintiff’s reliance on the truth of the representation;
- 25 (8) plaintiff’s right to rely upon it; and
- 26 (9) damages suffered by the plaintiff.

27 Stiley v. Block, 130 Wash.2d 486, 505 (1996). Gordon does not—and given his status as  
28

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<sup>3</sup> Washington also recognizes the tort of deceit which is “an action of tort, based on fraud”. Kritzer v. Moffat, 136 Wash. 410, 417 (1925). Washington courts treat deceit and fraud similarly. See, e.g., Pike v. Parallel Film Distrib., 74 Wash.2d 218, 224 (1968); Barker v. Scandinavian-American Bank, 97 Wash. 272, 276 (1917) (the torts of fraud and deceit have the same elements).

1 a professional plaintiff cannot—demonstrate that his CEMA claims arise from the  
2 common law tort of fraud. They are based on immaterial errors which are preempted  
3 under Virtumundo, and Gordon cannot reasonably claim to have been misled by email  
4 headers anyway, given his long history of seeking to profit from them. Consequently, his  
5 CEMA claims cannot survive preemption.

6           **c. This Court Held, and the Ninth Circuit Affirmed, That  
7           Gordon's CPA Claim Fails Because It Is Based on His Flawed  
8           CEMA Claim and Does Not Allege Material Deception.**

9           In Virtumundo, this Court dismissed Gordon's CPA claim, which was based on  
10 his pre-empted CEMA claim. 2007 U.S. Dist. LEXIS 35544 at \*41. The Ninth Circuit  
affirmed:

11           Because his CEMA claims fail as a matter of law, his CPA claims, to the  
12 extent grounded in CEMA violations, are likewise inadequate and were  
properly dismissed. Virtumundo II, 575 F.3d at 1065.

13           To the extent that Gordon also brings independent CPA claims, they too  
14 fail. Gordon has failed to identify an act or practice that "misleads or  
misrepresents something of material importance." Id. (cite omitted,  
emphasis original).

15  
16           Gordon's claims in Virtumundo and this case are identical. This Court dismissed the  
17 same claims in Virtumundo, and the Ninth Circuit affirmed the dismissal. Consequently,  
18 the third prong of the issue preclusion test has been met.

19  
20           **4. Virtumundo and This Lawsuit Have the Same Plaintiff.**

21           Both this case and Virtumundo involve the same plaintiff, Gordon. Accordingly,  
22 the fourth prong of issue preclusion has been satisfied, and this Court should dismiss all  
23 of Gordon's claims as a matter of law, pursuant to Rule 12(c).

24           **IV. CONCLUSION**

25           Gordon filed identical claims in Virtumundo, which this Court summarily  
26 dismissed. The Ninth Circuit affirmed. The deadline for petitioning for Supreme Court  
27 review in that case has passed. Accordingly, all issues have been decided against Gordon  
28 in a final judgment, after an extensive opportunity to litigate them. Gordon's FAC does

1 not allege the elements of fraud which are necessary to support a CEMA or CPA claim  
2 after the Virtumundo decisions. Even if Gordon did allege the necessary elements, he has  
3 admitted on the record to being a professional plaintiff, and cannot credibly claim to have  
4 been misled by the immaterial errors described in his complaint. Accordingly,  
5 SmartBargains respectfully requests this Court grant judgment on the pleadings and  
6 dismiss Gordon's claims with prejudice.

7

8 DATED this 18th day of January, 2010.

9

10 **NEWMAN & NEWMAN,**  
**ATTORNEYS AT LAW, LLP**

11 By:

12   
Derek A. Newman, No. 26967  
Derek Linke, WSBA No. 38314

13  
14 Attorneys for Defendant  
SmartBargains.com, LP